> if the contract is of a kind made illegal by a statutory enactment in order to protect the interests of a particular class of person, and the plaintiff is himself one of such class: *Williams* v *Hedley* (1867) 8 East 378.

In support of this, I need only to refer to the well known case of *Wallersteiner* v *Moir*.[2] Lord Denning MR said at p 1014:

> In *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript No 388 of 1961), Harman LJ said: 'the section was not enacted for the company's protection but for that of its creditors; ... the company, ... cannot enforce it.' I do not agree. I think the section was passed so as to protect the company from having its assets misused.

Again, Scarman LJ said at p 1033:

> ... the section must have been enacted to protect company funds and the interests of shareholders as well as creditors. I do not agree with the dictum of Harman LJ in *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript 388 of 1961) to the effect that the section was enacted not for the company's protection but for that of its creditors.

Wallersteiner v *Moir*[2] was a case on s 54 of the English Companies Act 1948 but there is no reason to suppose that it is not equally applicable to s 190 of the English Companies Act 1948 and by the same token applicable to s 133 of our Companies Act 1965.

Applying *Wallersteiner* v *Moir*,[2] I am of the view that s 133 of the Act (and for that matter s 67) was passed to protect the company from having its assets depleted through misuse and not only to protect its creditors and shareholders: see the headnote of the report, at p 993. The charge transaction in the present case is made illegal and therefore void by virtue of s 133 of the Act which was enacted for the protection of companies from having their assets depleted through misuse. Thus, the plaintiff company will be permitted to recover against the defendant co-operative society by having the charge on its lands cancelled and for the return of all documents of title.

I would therefore grant the consequential orders sought. Costs to the plaintiff.

Application allowed.

Solicitors: *Asbir, Hira Singh & Co; Saheran & Woon.*

Reported by *PS Ranjan*

Sarawak Government v KCS Sawmill Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 22 OF 1989
HAIDAR J
21 FEBRUARY 1990

Civil Procedure — Summary judgment — Whether available against government — Order made without hearing parties — Patent error — Whether court may exercise revisionary jurisdiction — Courts of Judicature Act 1964, ss 16 & 33 — Government Proceedings Act 1956, ss 29(1) & 42(1) — Rules of the High Court 1980, O 14 & O 73 r 5(1) — Subordinate Courts Rules 1980, O 1 r 4, O 26A & O 43

The respondent had commenced an action in the sessions court against the appellant, the government of Sarawak, and later applied for summary judgment against the appellant under O 26A r 2 of the Subordinate Courts Rules 1980. The appellant in turn applied to the sessions court for an order to strike out the respondent's application on the ground that no application may be made under O 26A r 2 of the Subordinate Courts Rules 1980 for summary judgment against the government. The sessions court judge dismissed the appellant's application and entered judgment in favour of the respondent even though the parties had not addressed her in respect of the respondent's application. The appellant appealed against the order dismissing its application but not against the order granting summary judgment against it. It was contended for the appellant that by virtue of various provisions of the Rules of the High Court 1980, particularly O 73 r 5(1), and by virtue of O 1 r 4(1) of the Subordinate Courts Rules 1980, no application for summary judgment may be made against the appellant and that such rule applied to proceedings in the subordinate courts as well, notwithstanding the absence of provision in the Subordinate Courts Rules 1980 similar to that of O 73 r 5(1) of the Rules of the High Court 1980.

Held, dismissing the appeal but setting aside the order for summary judgment:

(1) In respect of the High Court, the Rules Committee made O 73 r 5(1) of the Rules of the High Court 1980 by which no application for summary judgment against the government shall be made. However, in respect of the subordinate courts, the Rules Committee made provision for summary judgment under O 26A of the Subordinate Courts Rules 1980 without excepting an application for such judgment against the government. Nor does O 43 of the Subordinate Courts Rules 1980 in respect of proceedings by or against the government provide a similar provision as O 73 r 5(1) of the Rules of the High Court 1980 excepting summary judgment against the government, thereby implying that summary judgment against the government would appear to be available in the subordinate courts as opposed to the High Courts.

(2) It was clear that in making the order for summary judgment in favour of the respondent, the learned sessions court judge had not addressed her mind properly to such application but treated it as a matter of course that in dismissing the appellant's application she should allow the respondent's application. She had patently committed an error in making the order in favour of the respondent. As she had obviously committed an error in making such an order, this was a proper case for the court to exercise its revisionary powers under s 33 of the Courts of Judicature Act 1964 and accordingly the order for summary judgment was set aside and the case remitted to her for her to

consider the respondent's application for summary judgment on its merits.

[*Editorial Note*: The Sarawak government (appellant) has appealed to the Supreme Court vide Civil Appeal No 01-30-90.]

Legislation referred to
Courts of Judicature Act 1964 ss 16, 33
Government Proceedings Act 1956 ss 29(1), 42(1)
Rules of the High Court 1980 O 14, O 73 r 5(1)
Subordinate Courts Rules 1980 O 1 r 4, O 26A, O 43

Bernard Philip Lanat (State Attorney General's Chambers) for the appellant.
Stanley Eddy for the respondent.

Cur Adv Vult

Haidar J: From the notice of appeal dated 9 October 1989, filed by the appellant, the Sarawak government, it would seem clear that the appeal is in respect only of the order of the learned sessions court judge dismissing the appellant's application to strike out the respondent's application under O 26A r 2 of the Subordinate Courts Rules 1980 ('SCR') on 7 October 1989.

From the record of the appeal, it is clear that there were in fact two applications for the determination of the learned sessions court judge, namely, an application for summary judgment by the respondent under O 26A r 2 of the SCR (p 11 of the record) and an application by the appellant to strike out the application of the respondent under O 26A r 2 of the SCR for summary judgment on the ground that no such application can be made under O 26A or O 43 of the SCR against the government, ie the appellant in this case. What happened in this case is that the learned sessions court judge dismissed the appellant's application and entered judgment in favour of the respondent as per the respondent's application even though the parties have not addressed her in respect of the respondent's application as can be seen from the appeal record and conceded to by Mr Stanley Eddy, counsel for the respondent. It is clear that in making the order that she did in favour of the respondent the learned sessions court judge has not addressed her mind properly on such application but treated it as a matter of course that in dismissing the appellant's application, she should allow the respondent's application. This is obvious by her one paragraph judgment though, perhaps, it can hardly be said to be a well-reasoned judgment (p 26 of the record). With respect, she has patently committed an error in making the order in favour of the respondent. Be that as it may, it is best that I consider first the dismissal of the appellant's application. In any event, the present appeal would appear to be confined only to the dismissal of the appellant's application.

There is only one issue raised by the appellant — can a summary judgment under O 26A of the SCR be made against the government, ie the appellant?

Counsel for the appellant submitted that O 26A of the SCR is inapplicable as against the government and relied on O 1 r 4(1) of the SCR to be read with O 73 r 5(1) of the Rules of the High Court 1980 ('RHC'). Order 1 r 4(1) of the SCR reads:

> In any matter of procedure or practice not provided for in these rules, the procedure and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

In both the RHC and SCR there is a provision in O 73 and O 43 respectively relating to 'proceedings by and against the government'. In O 73 of the RHC, r 5(1) thereof provides:

> No application against the Government shall be made under Order 14 rule 1, or Order 81 rule 1, in any proceedings against the Government nor under Order 14 rule 5, in any proceedings by the Government.

However, there is no similar provision as r 5(1) above in O 43 of the SCR. The appellant's counsel relied on the views expressed by KS Dass and Abdul Hamid bin Hj Mohamed in *Subordinate Courts Practice* (1981) when in dealing with O 26A of the SCR the learned authors said at p 432:

> The circumstances which may be considered that the case is not within O 26A are: (1) the statement of claim discloses that the action is one which is specifically excluded for summary judgment by virtue of O 26A r 2(1); (2) where the affidavit in support of the application is defective; and (3) *where the summary judgment is sought against the government*. In all these cases the court should dismiss the application. (Emphasis added.)

At the footnote, the learned authors said:

> There is clear provision in the RHC 1980 (O 73 r 51) to the effect that an O 14 judgment cannot be made against the government *but there is no such provision in the SCR 1980*. By virtue of O 1 r 2(1) of the SCR, (should read r 4(1)) the procedure and practice in the High Court can be followed. It follows therefore that an application for summary judgment under O 26A cannot be made against the government. (Emphasis added.)

Section 29(1) of the Government Proceedings Act 1956 ('the said Act') prescribes the powers of the court to make orders or relief in respect of civil proceedings by or against the government. Section 29(1) reads:

> In any civil proceedings by or against the government the court shall, *subject to this Act*, have powers to make all such orders as *it has power to make in proceedings between subjects, and otherwise to give such appropriate relief* as the case may require. (Emphasis added.)

Section 42(1) of the said Act provides that any power to make rules shall include power to make rules for the purpose of giving effect to the said Act, and any such rules may contain provisions to have effect in relation to any proceeding by or against the government in substitution for or by way of addition to any of the rules applying to

proceedings between subjects. One of the provisions that shall be made by rules of court is provided by s 42(2)(c) of the said Act which reads:

> ...for excepting proceedings brought against the Government from the operation of any rule of court providing for summary judgment without trial, and for enabling any such proceedings to be put in proper cases into any special list which may be kept for trial of short causes in which leave to defend is given under any such rule of court as aforesaid:

In respect of the High Court, the Rules Committee made O 73 r 5(1) of the RHC in which no application against the government shall be made under O 14 r 1 (ie summary judgment) invoking, in my view, s 16(p) of the Courts of Judicature Act 1964 ('CJA') which reads:

> ...for any purpose for which rules of court may be made under any written law.

In my opinion 'written law' refers particularly to s 42(2)(c) of the said Act.

However, in respect of the subordinate courts, the Rules Committee made provision for summary judgment under O 26A of the SCR without excepting such application against the government. Nor does O 43 of the SCR (in respect of proceedings by or against the government) provide similar provision as O 73 r 5(1) of the RHC excepting summary judgment against the government thereby implying that summary judgment against the government would appear to be applicable in the subordinate courts as opposed to the High Courts. It thus would appear to give effect to s 29(1) of the said Act by making the proceedings against the government in respect of summary judgment the same as between subjects. It is to be noted that the composition of the Rules Committee in respect of the High Courts (s 17 of the CJA) and the subordinate courts (s 3 of the Subordinate Courts Rules Act 1955) are substantially the same except that in respect of the subordinate courts, the sessions court judges in West Malaysia and the magistrates of the first class in East Malaysia may be called upon to be members by the Lord President. In any event, in both the Rules Committees, the government is represented by the Attorney General or his representative/s as may be applicable. It would seem clear to me that in respect of the subordinate courts, the provision excepting the government against summary judgment was deliberately left out presumably because before the amendment to the increase in the civil jurisdiction of the Subordinate Courts in 1987, the jurisdiction of the subordinate courts was only $25,000, a figure that may be considered small for excepting the summary judgment against the government and therefore the provision of s 42(2)(c) of the said Act was not invoked, otherwise the Attorney General, as the representative of the government, would have made such representation to the Rules Committee in respect of the subordinate courts. Therefore, in my view, O 1 r 4(1) of the SCR is clearly not intended to cover the situation as in the present case. In that event, I am of the opinion that summary judgment in the subordinate courts is clearly applicable as against the government, ie it should be treated the same as proceedings between the subjects by virtue of s 29(1) of the said Act. With respect, therefore, I do not agree with the views of the learned authors in the *Subordinate Courts Practice* (1981) that O 26A of the SCR is inapplicable to the government. In the circumstances, I agree with the order of the learned sessions court judge dismissing the application of the appellant in respect of the issue of O 26A of the SCR relating to the proceedings against the government for summary judgment and affirm it accordingly.

In respect of the order of the learned sessions court judge granting the summary judgment against the appellant, as I said earlier, she has not properly addressed her mind to the said application and this was also rightly conceded by counsel for the respondent. In my view, she is clearly in error here. Though the appellant in the notice of appeal apparently did not appeal against her order giving summary judgment in favour of the respondent but as she obviously committed an error in making such an order, in my opinion, this is a proper case for the court to exercise its revisionary powers under s 33 of the CJA and I accordingly set aside her order of summary judgment. In the circumstances, I would remit the case to her for her to consider the respondent's application for summary judgment on its merits. I would order the costs of this appeal and the applications before her to the respondent in any event.

Order accordingly.

Solicitors: *Battenberg & Talma Advocates.*

Reported by *PS Ranjan*